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OCT 4 1934
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CLERK

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 361

E. W. CLARK, Commissioner of Insurance of the State of Iowa, as Receiver of Federal Surety Company,

Petitioner,

vs.

HARRY O. WILLIARD, W. W. WHEATON, and C. W. HAY, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and GORDON CAMPBELL-KEVIN SYNDICATE, a Common-Law Trust,

Respondents.

BRIEF FOR GEORGE S. VAN SCHAICK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT.

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as Superintendent of Insurance of the
State of New York.

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Statement.

The Superintendent of Insurance of the State of New York appears on this application as a friend of the Court. The New York Insurance Department is probably more vitally concerned with the outcome of this litigation than the parties themselves. New York is the domicile of more large insurance companies doing inter-state business than any other state in the Union. During the crisis the Department was compelled to take over for conservation, rehabilitation or liquidation more companies doing an inter-state business than any other Department in the country. The New York Superintendent, like the Superintendent in

Iowa, is the statutory liquidator and under our laws, upon dissolution, the life of the company becomes extinct and title to all assets is vested in the Superintendent of Insurance for the benefit of creditors.

It is because of the very serious and substantial difficulties in the administration of these companies that the Superintendent of Insurance pleads with this Court to take jurisdiction and outline in broad and unmistakable terms essential policies applicable to the administration of the assets of large insurers having creditors scattered throughout the Union.

We shall not burden this Court with a repetition of the authorities which have been cited and discussed in the briefs of the parties but shall confine this discussion to the effect of the policy expressed by the Montana courts on the administration of the estates of large insurers.

Uniform law and procedure in the liquidation of interstate insurers is essential if injustice and inequalities are to be avoided and trust properties are to be distributed fairly and equitably to those entitled thereto.

It is our experience in the administration of large insurance companies which have been dissolved by our statute that while both creditors and assets are widely distributed throughout the various states practically no net assets are received by the statutory liquidator from other states. The funds are usually consumed in local administration and too often are dissipated by needless lawsuits and by a few selfish local creditors who have been able to attach the property of the liquidator and convert it, through a local decision, to the satisfaction of their own claims regardless of the rights of creditors in general. We do not refer here to legitimate preferences to the assets in the state created by law and arising out of public policy and public welfare, such as preference to compensation claimants which is granted in four of the states, or to the local distribution of trust funds for the benefit of claimants who

appear in the proceedings in that state, but rather to the attachment of the general assets of the liquidator located within the state by individual creditors and the attempt to satisfy their claims in full regardless of the ratable distribution to other creditors of the same class.

In Montana a writ of attachment was secured by a local creditor against the property of one of our companies although the company had been dissolved and title to the assets had been vested in the Superintendent as liquidator before the action was commenced. The issues presented are now in litigation and the decision of the court in the present case will have a great bearing on the determination of this litigation.

In Michigan the receiver appointed at the behest of an attaching creditor was given preference over the receiver appointed at the request of the local Superintendent of Insurance for all creditors. This dispute is in process of adjustment but the litigation is still pending.

Even in the State of Pennsylvania, which has generally pursued an enlightened policy, this issue is in doubt and there are some decisions to the effect that local creditors of a foreign insurance company must be paid in full before any assets can be removed from the state.

As we go to press we learn that an Alabama court has decided that the surplus from a local deposit of a New York company in liquidation, after the payment of the creditors and the Alabama official bonds for which the deposit was made, will not be returned to the New York liquidator for general distribution but is payable to Alabama claimants.

In Ohio local creditors have attached funds of a New York company and are attempting to hold them for the full satisfaction of their own claims regardless of the rights of other creditors.

On the other hand, in Oklahoma a local creditor obtained judgment by default against the Federal Surety Company after the dissolution of that corporation in the state of its domicile and upon the question of the validity and en-

forcibility of the judgment the Federal District Court in Oklahoma held:

> "'From the time of that entry the corporation has been dead, all its agencies ended, its employees, including attorneys, discharged; and it put, without exception or notice of appeal, beyond all future corporate activity.
>
> "'The effect was to "put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties, so that thereafter it can neither make nor take contracts, nor sue nor be sued, and so that all debts to or from it became extinguished, and all actions by and against it abated."' * * *
>
> "It is 'only the corporations whose charters expire by limitation or the voluntary act of the stockholders which continue for the purpose of winding up their affairs, Section 1629 Code; State *vs.* Fogerty, 105 Iowa 36, 74 N. W. 754. * * * To a corporation dissolution is as final as death to a person. It thereafter can have no interest in the property once by it controlled. * * * That is the subject of administration'." (State of Iowa *v.* Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.)
>
> *Clinton* v. *Coppedge*, 2 Fed. S. 935 (decided in March, 1933).

With the principles laid down by the Oklahoma court we are in hearty accord. The contrary decisions and policies adopted in the various states—some broad and public spirited; some selfish and short-sighted—make just and equitable liquidation of inter-state insurers almost impossible. It is for the purpose of attempting to correct this situation that we appear here, although we are not parties to the action.

The status of a dissolved insurance company must be determined by the state of its creation. If, under the laws of the state creating and dissolving a corporation the corporation ceases to exist, the action of such state is as decisive in the foreign state as in the state of its creation,

for as Chief Justice Taney said in the *Bank of Augusta* v. *Earle*, 13 Peters, 519, 588:

> "A corporation can have no legal existence out of the boundary of the sovereignty by which it is created * * * it must dwell in the place of its creation and cannot migrate to another community."

The courts or legislatures may limit the privileges and rights of a foreign company admitted to its state but cannot enlarge the charter powers. Unless the state creating a corporation prolongs its existence for specified purposes and a designated time, subsequent to dissolution, foreign states have no power to do so.

The Montana policy will interfere with, and is directly opposed to, the very purpose of liquidation proceedings. These proceedings are instituted with a view of administering the affairs of a dissolved insurance company for the benefit of, and to distribute its assets among, all creditors similarly situated, wherever resident, upon the principle that equality is equity. In such proceedings every general creditor, wherever residing, is entitled to share ratably in the distribution of the general assets of a dissolved insurance company; and after the dissolution of a company, no creditor should be permitted by smart legal proceedings to acquire a priority or preference over other creditors similarly situated. The effect of the Montana policy as now declared very obviously accords Montana creditors preferences and advantages which are not accorded to other creditors.

If the broad, general principles laid down by this Court in *Relfe* v. *Rundle*, 103 U. S. 222 and *Converse* v. *Hamilton*, 224 U. S. 243, were generally accepted and followed by the courts of the various states, the petition for review would not be necessary. Not only in these decisions, but in the General Order in Bankruptcy No. 51, this Court has taken the position that the administration of the assets by the primary receiver shall not be carelessly and selfishly interfered with by local creditors. The liquidator of a large

insurance company, like the primary receiver in bankruptcy, must, in order to fairly and efficiently administer the estate and distribute the assets equitably, have general control of the assets of the dissolved company throughout the United States and local receivers should cooperate with the receiver in the domiciliary state. The vesting of title in the liquidator for the benefit of all creditors must be recognized by local courts if serious injustice and inequality are to be prevented.

In the interests of orderly liquidation we ask this Court to take jurisdiction of this case and unmistakably elucidate for the guidance of the local courts a broad, general and equitable policy for the administration of the estates of inter-state insurers by statutory liquidators vested with title to assets.

LOUIS H. PINK,
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AS SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK.